STATE OF MICHIGAN

COURT OF APPEALS

SCOTT ZENTGRAF, a/k/a SCOTT ZENTGRAFF, as Next Friend for SABRINA ZENTGRAF, a minor,

Plaintiff-Appellant,

v

WALTER GATES,

Defendant-Appellee.

UNPUBLISHED
December 4, 1998

No. 203375
Wayne Circuit Court
LC No. 96-612618 NO

Before: Sawyer, P.J., and Wahls and Hoekstra, JJ.

MEMORANDUM.

Plaintiff appeals by right the trial court's grant of summary disposition for defendant, on the basis of governmental immunity, in this personal injury action arising out of injuries eight-year-old Sabrina Zentgraf sustained while climbing a chain-link "cyclone" fence used as a baseball backstop at an elementary school playground. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff argues that summary disposition should not have been granted because a genuine issue of material fact exists as to whether defendant was grossly negligent within the meaning of MCL 691.1407(2)(c); MSA 3.996(107)(2)(c), which defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." We disagree.

If reasonable jurors could honestly reach different conclusions as to whether conduct constitutes gross negligence under MCL 691.1407(2)(c); MSA 3.996(107)(2)(c), the issue is a factual question for the jury. However, if reasonable minds could not differ, the issue may be determined by summary disposition. *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998), quoting *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

"Gross negligence" requires more than ordinary negligence. See, e.g., *Jackson*, *supra*, 458 Mich at 150-151; *Haberl v Rose*, 225 Mich App 254, 265-266; 570 NW2d 664 (1997). There must be some arguable demonstration of indifference toward the possibility of injury, such

as a complete failure to take any steps to avoid a known danger. See, e.g., *Tallman v Markstrom*, 180 Mich App 141; 446 NW2d 618 (1989) (teacher permitted student to use table saw without guarding or safety devices); *Nelson v Altmont Comm Schools*, 931 F Supp 1345 (ED Mich, 1996) (school principal's mishandling of matter after being placed on notice of teacher's improper relationship with student).

Here, there is nothing to indicate that defendant knew children might climb the fence. Nor are any particular circumstances presented in this case to support a determination that defendant's failure to anticipate children climbing the fence demonstrates a substantial lack of concern for whether an injury results. For example, there is no indication that defendant permitted climbing on the fence or failed to stop climbing when it occurred. Cf. *Smith v Kowalski*, 223 Mich App 610, 617; 567 NW2d 463 (1997). ("Plaintiff does not claim that defendants saw the inmates playing football in the courtyard, or sat idly by while they were doing so.") Indeed, plaintiff has presented no evidence that anyone had ever climbed on the backstop fence before.

On de novo review, we agree with the trial court that plaintiff failed to present evidence that would permit reasonable minds to differ on the issue of gross negligence. Viewing the evidence in the light most favorable to plaintiff, the circumstances presented in this case at most indicate only an arguable case of ordinary negligence, not the kind of substantial lack of concern about injury required to establish "gross negligence" as defined by MCL 691.1407(2)(c); MSA 3.996(107)(2)(c).

Affirmed.

/s/ David H. Sawyer
/s/ Myron H. Wahls
/s/ Joel P. Hoekstra